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No. 89-1632

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,

PETITIONER,

v.

HODARI D.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA

BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE ON BEHALF OF PETITIONER

Appellate Committee of
The California District
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QUESTION PRESENTED

Did the observations of the police officers provide sufficient reasonable suspicion for an investigatory detention?

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BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE ON BEHALF OF PETITIONER

Amicus curiae, the Appellate Committee of the California District Attorneys Association, and Ira Reiner, District Attorney of Los Angeles County, are filing this brief accompanied by the written consent of all parties pursuant to Rule 37.3, Rules of the Supreme Court of the United States.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by an association consisting of the District Attorneys of the State of California

and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Los Angeles County. Upon review of the instant matter -- which raises the question of what constitutes reasonable suspicion for detention of individuals who flee at the approach of law enforcement personnel -- the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case shall likely have substantial impact upon the administration of criminal justice throughout California. *Amicus* also believes that the *amicus curiae* brief attached hereto "brings relevant matter to the attention of the court that has not already been brought to its attention by the parties" in that petitioner has chosen not to argue the issue of whether reasonable cause existed for the detention of respondent. Rule 37.1, Rules of the Supreme Court of the United States.

Amicus concurs with the position taken by the Attorney General of the State of California, as presented in the Petition for Writ of Certiorari, that there was no detention prior to the physical restraint of respondent by the police. However, *amicus* herein discusses an issue that the respondent has raised (see Respondent's Brief in Opposition to Petition for a Writ of Certiorari, pp. 8-23): whether, if there was a detention, it was based on reasonable suspicion. This issue is not addressed by petitioner, since petitioner takes the position that the conduct of the police was lawful whether or not there was reasonable suspicion for an investigatory detention.

SUMMARY OF ARGUMENT

The California Court of Appeal briefly discussed the issue of reasonable cause to detain respondent. That court noted that the Attorney General [respondent below] did not dispute the trial court's findings that the police had no reasonable cause to chase or detain respondent herein. The Court is not bound by the apparent concession of the Attorney General of the State of California below. *Sibron v. New York*, 392 U.S. 40, 58 (1968). Since respondent did raise the issue of reasonable cause in the courts below, *amicus*, out of an abundance of caution, addresses that issue here.

In *Michigan v. Chesternut*, 486 U.S. 567, 572 (1988), this Court found it unnecessary to decide the issue of whether and under what circumstances flight from police officers may, without more, provide a sufficient reason for an investigatory stop. *Amicus* argues that the California State Court of Appeal failed to give the factor of unprovoked flight from the police officers proper weight in assessing whether that flight together with other facts articulated by the police concerning their observations, *i.e.*, four young men huddled together at the side of a car in the attitude of drug sellers at 10:00 p.m. at an address where trained narcotics officers had previously made arrests for narcotics sales.

Since *Peters v. New York*, decided concurrently with *Sibron v. New York*, 392 U.S. 40, 66-67, flight at the approach of strangers or law enforcement has been considered a strong indicia of suspicious conduct. Where some other indicia of criminal behavior is observed, unprovoked flight in the presence of strangers or police officers provides the particularity and specificity of an individual's suspicious conduct required for an investigatory detention. See *United States v. Cortez*, 449 U.S. 411, 417-418 (1981).

ARGUMENT

I

THIS COURT IS NOT BOUND BY THE APPARENT CONCESSION OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA ON THE ISSUE OF REASONABLE CAUSE TO DETAIN

In the opinion of the California State Court of Appeal the issue of reasonable cause to detain is discussed briefly. That court stated:

> The trial court concluded that the police had no reasonable cause to detain appellant prior to his discard of the drugs. Respondent does not dispute the trial court's finding that the police had no reasonable cause to chase or detain appellant, choosing to rest on the argument that there was no detention.

See Appendix A to the Petition for Writ of Certiorari previously filed.

This Court is not bound by the apparent concession of the Attorney General of the State of California below. In *Sibron v. New York*, 392 U.S. 40, this Court disregarded a state's representation of error and reached the merits stating:

> Confessions of error are, of course, entitled to and given great weight, but they do not "relieve this Court of the performance of the judicial function." [Citation omitted.] It is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained. For

> one thing, as we noted in Young, "our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties." [Citations omitted.]

Id. at 58.

The same reasoning applies to an apparent concession as to a confession of error.[1]

II

THE SPECIFIC FACTS ARTICULATED BY THE POLICE OFFICERS, ESPECIALLY THE FLIGHT OF THE SUSPECTS, PROVIDED SUFFICIENT REASONABLE SUSPICION FOR AN INVESTIGATORY DETENTION

In *Michigan v. Chesternut*, 486 U.S. 567, 572, this Court found it unnecessary to consider the issue of flight as providing a sufficient reason for an investigatory stop. However, in that same case this Court opined that the attempt to establish a bright line rule on the related issue of the propriety of police chases must fail in that both petitioner and respondent "failed to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account '"all of the cir-

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1. *Amicus* is mindful of the prohibition against presenting additional questions in an *amicus curiae* brief. *United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 530, n.13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1960). However it is the position of *amicus* that this prohibition does not apply in the instant case in that the issue of reasonable suspicion for detention was discussed below and has been raised by the respondent in this Court. Respondent's Brief in Opposition to Petition for a Writ of Certiorari, pp. 8-23; see *Bell v. Wolfish*, 441 U.S. at 530, n.13; see also *Toussaint v. McCarthy*, 801 F.2d 1080, 1106, n.27 (9 Cir. 1986).

cumstances surrounding the incident'" in each individual case. [Citation omitted.]" *Ibid.*

Accordingly, *amicus* does not seek to establish flight from the presence of law enforcement personnel as invariably a *per se* reason for detention. Whether flight from police justifies a warrantless investigative stop should be judged on a consideration of the totality of the circumstances in the case before the court. *State v. Jackson*, 147 Wis.2d 824; 434 N.W.2d 386, 388-389 (1989). As stated in *Peters v. New York*, decided concurrently with *Sibron v. New York*, 392 U.S. at 66-67:

> [D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.[2] [Citations omitted.]

In the instant case, two police officers assigned to the Oakland, California, Police Department's Drug Task Force were on patrol at 10 p.m. in the vicinity of Foothill Boulevard and 64th Avenue when they saw four young men huddled together at the side of a small red compact car which was parked at a location known to be an area of high narcotic activity and at an address where both officers had participated in several narcotics arrests. (J.A.[3] 25-26, 36-38.) The officers were in an un-

2. In concurring opinions Justices White, and Douglas stated that in their view the facts in *Peters*, including the flight of the suspects, gave rise to a reasonable suspicion sufficient for a *Terry* stop which ripened into probable cause for arrest only after burglar's tools were found during a pat-down search. *Peters v. New York* decided together with *Sibron v. New York*, 392 U.S. at 69, 70.

3. The abbreviation "J.A." refers to the Joint Appendix filed by the petitioner.

marked brown Dodge but they were wearing standard task force uniforms, blue jackets with the word police written on the front and back, blue jeans, gun belt and tennis shoes. (J.A. 26, 37.) As the officers turned their car in the direction of the red compact car, four young men ran off and the car drove off quickly. (J.A. 27-29, 37.) The officers had not activated any emergency equipment or said anything to the individuals prior to the red car speeding off and the young men running. (J.A. 28-29, 39.) By the time Officer McColgin, who was the driver, stopped the car, all of the individuals were out of sight. (J.A. 41.) Officer Pertoso then left the car and ran in a manner to cut off one of the fleeing youths, respondent, Hodari D. (J.A. 41.) When Officer Pertoso located respondent, respondent was running towards him but looking over his shoulder as if to ascertain whether or not someone was following him. (J.A. 41.) When Officer Pertoso reached a position approximately 11 feet in front of respondent, respondent turned in the officer's direction, a startled look came over respondent's face, and respondent in an underhand scooping motion discarded what appeared to the officer to be a single loose rock of cocaine. (J.A. 42-44, 45.) Respondent continued towards Officer Pertoso who, having identified the object thrown as a suspected piece of rock cocaine, forced respondent toward the ground and handcuffed him. When the piece of rock cocaine was retrieved, the respondent was placed under arrest. (J.A. 42-44, 106.)

Neither officer had seen any objects or currency change hands between or among the individuals surrounding the red car, nor had they recognized any of the individuals who ran immediately upon the officers' approach in an unmarked car. It was Officer Pertoso's intention to cut off one or more individuals who had run in order to contact them and find out what they were about. (J.A. 35, 44-46.) Officer McColgin retraced the route that respondent had run and found a stash of 15 pieces of suspected rock cocaine. (J.A. 30-31.) Officer

Pertoso searched respondent pursuant to his arrest and recovered $130 in U.S. currency and a pager. (J.A. 106.)

In the *Peters* case, Peters was apprehended in possession of burglar's tools. A police officer was at home in his New York apartment when he heard a noise at his door as he was drying himself off after a shower. His investigation of the noise was interrupted by a telephone call. After the telephone call, he looked through the peephole of the door to the hallway and saw two men tiptoeing in the hall in a furtive manner. The officer had lived in the building for 12 years and did not recognize these men as tenants. The officer called the police, put on civilian clothes and armed himself with his service revolver. He again looked through the peephole to find the two men continuing to look about the hallway. The officer entered the hallway, slamming the door behind him. The two men immediately fled down the stairs upon the slamming of the door. The officer gave chase. He apprehended Peters between the fourth and fifth floors, grabbed him by the collar, and continued down another flight in an unavailing pursuit of the other man. Peters attempted to explain his presence in the building by saying he was visiting his girlfriend, but he declined to give her name on the ground that she was a married woman. The officer patted Peters down for weapons and discovered burglar's tools. *Sibron v. New York*, 392 U.S. at 48-49.

As noted above, this Court considered the flight of these individuals at the approach of the officer, even though he could be characterized as a mere stranger in civilian clothes, as a "strong indicia of mens rea." 392 U.S. at 66-67. This Court also found that the suspicious behavior of these individuals, coupled with their flight, constituted not only reasonable suspicion for detention but probable cause for arrest. *Id.* at 66-67, 79.

In *United States v. Green*, 670 F.2d 1148 (D.C. Cir. 1981), the Court of Appeals for the District of Columbia found probable cause to arrest where the defendant was observed by an experienced member of a drug enforcement unit to accept currency from an accomplice and supply the accomplice with an object which the accomplice then gave to an unidentified man who had given the accomplice the money. Defendant Green had retrieved the object from a brown paper bag which he subsequently placed in his jacket pocket. Believing that he had observed a drug transaction, the drug enforcement officer radioed a description of Green who was approached by two undercover officers in an unmarked patrol car. Apparently recognizing either the unmarked patrol car or the officers as they approached, the defendant ran quickly into a restaurant looking over his shoulder at one of the officers. The defendant moved his right hand five or six feet inside the restaurant, removed his hand and proceeded to back out the door. As he exited he was arrested and a brown paper bag was found at a point consistent with where the defendant had moved his right hand. *Id.* at 1150-1151. The court found probable cause not merely to detain, but to arrest based upon the interaction between the defendant, his accomplice and another unidentified individual, the surreptitious movements of their hands in an apparent attempt to conceal the object of exchange, and the "*appearance of flight and evasion*" (*id.* at 1151, emphasis added) by Green at the approach of undercover officers. The court noted that none of these indicia of criminality, standing alone, would constitute probable cause for arrest, but that a combination of these factors, including apparent flight, was sufficient to constitute reasonable cause not only for detention but for arrest. *Id.* at 1151-1152.

In both of these cases the flight of the suspect was not induced by any action on the part of the police. Where flight is not induced or provoked by police conduct it is a strong indication of a guilty mind. 3 LaFave, Search and Seizure (2d

ed. 1987) § 9.3(c), p. 449, fn. 150. Other courts have held that flight alone, at the mere approach of the police unprovoked by any police conduct, constitutes a reasonable cause for a brief investigatory stop. *State v. Anderson*, 155 Wis.2d 77, 454 N.W.2d 763 (1990) [defendant's conduct in driving rapidly away after sighting squad car was flight from police which was sufficiently suspicious behavior to justify temporary investigative stop]. In *Michigan v. Chesternut*, 486 U.S. 567, 576, Justice Kennedy in a concurrence, joined by Justice Scalia, stated, "respondent's unprovoked flight gave the police ample cause to stop him." Between the finding of probable cause to arrest espoused in *Peters* and *Green*, and the detention based on no more than flight in *Anderson* and the *Chesternut* concurrence, lies the instant case.

Assuming, arguendo, that respondent was detained when he turned his head and found Officer Pertoso advancing on him wearing a jacket emblazoned with the word police some 11 feet away, and that at that moment he had been seized in the sense that his freedom of movement had been restrained by the show of authority, *United States v. Mendenhall*, 446 U.S. 544, 553-554 (1980), reasonable cause for that detention lay in the totality of the circumstances which presented themselves to the police.

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances -- the whole picture -- must be taken into account. Based upon that whole picture the detaining officers must have a particularized and

> objective basis for suspecting the particular person stopped of criminal activity. [Citations omitted.]
>
> The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions -- inferences and deductions that might well elude an untrained person.
>
> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact finders are permitted to do the same -- and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.
>
> The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in Terry v Ohio, supra, said that "[t]his demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth*

Amendment jurisprudence." [Citation omitted] (emphasis added). [Citations omitted.]

United States v. Cortez, 449 U.S. at 417-418.

Amicus submits that when an officer possesses information and makes observations that cause him to reasonably suspect, based upon his training and experience, that an individual or a group of individuals has committed, is committing or is about to commit a crime, and that individual or group flees from the mere presence of the officers, unprovoked by any conduct of the officers other than their arrival on the scene, no further particularity or specificity is required to initiate an appropriately circumscribed investigatory detention of that individual or group of individuals.

As stated by the Wisconsin Supreme Court, the facts in *Terry v. Ohio*, 392 U.S. 1 (1968), were no more than an officer watching "the defendant and another man repeatedly walk back and forth in front of a store window at 2:30 in the afternoon, and then confer with each other." *State v. Jackson*, 147 Wis.2d 824, 434 N.W.2d at 389. The Wisconsin court also quoted *Adams v. Williams*, 407 U.S. 143, 145-46 (1972):

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."

State v. Jackson, 147 Wis.2d 824, 434 N.W.2d at 389.

Similarly, in the instant case, the narcotics officers, who observed four young men huddled at the side of an occupied automobile, in an area of high narcotics activity at 10:00 p.m. at an address where the same officers had made arrests for drug sales, were justifiably suspicious. When the youths ran and the car departed at a high rate of speed merely because the officers' car turned the corner in their direction, that suspicion ripened into reasonable cause for a brief detention. The fact that the officers had not seen any objects change hands at the side of the car does not alter their right to detain. If, in addition to their other observations, they had seen objects exchanged they, arguably, would have had probable cause for an arrest. *United States v. Green*, 670 F.2d at 1150-51.

In *People v. Brown*, 216 Cal.App.3d 1442, 265 Cal.Rptr. 552 (1990), officers saw the defendant standing in a crowd in front of a dance hall holding a paper bag. The group was standing in a semi-circle around the defendant who held the bag out toward the group, apparently displaying something to the other individuals in the group. The officers could not tell what was in the bag, and did not see any exchange take place. Some people yelled out roller, a term for a policeman, and the crowd dispersed. The officers left the area and called for backup. When they returned approximately five minutes later, the defendant was again standing in front of the dance hall. The police stopped their vehicle and the defendant quickly went back inside the dance hall. At that point an officer went in after him and saw him drop the paper bag and take off again past the police. *Id.* at 1445-1446, 1450. As the court noted in *Brown*:

> In an earlier day before the traffic in illicit drugs became endemic to our society, the above circumstances might not -- and probably would not -- have been

> consistent with criminal activity. Unfortunately, times have changed, and a multitude of controlled substances are openly bought and sold on our streets and in our neighborhoods. To any police officer knowledgeable of such conditions, the circumstances above described would not only raise, but almost compel, a reasonable suspicion that conduct "consistent with criminal activity" was taking place.

Id. at 1450.

In *United States v. Sharpe*, 470 U.S. 675 (1985), this Court upheld the stop of a pickup truck traveling in tandem with a passenger car for some 20 miles in an area of the North Carolina coastline known to be frequented by drug traffickers. An experienced agent testified that pickup trucks with camper shells were often used to transport large quantities of marijuana. The pickup truck appeared to be heavily loaded, and the windows were heavily covered to obstruct outside viewing. After following the vehicles for 20 miles the agent decided to make an investigative stop and radioed the state highway patrol for assistance. When a marked patrol car reached the suspected vehicles, they abruptly turned off the highway, and traveled down a campground road in excess of the speed limit. After the two vehicles reentered the highway, the marked patrol car was successful in pulling over the passenger car, but as he did so, the pickup truck accelerated and fled the scene. The pickup truck was ultimately stopped. *Id.* at 677-679, 683.

The principle issue in that case was the length of the pre-arrest detention of the persons driving the passenger car and the pickup truck. However, the Court found the flight of the pickup truck to be a significant factor in upholding both the investigatory detention itself and the length of that detention. The Court stated:

> Agent Cooke had observed the vehicles traveling in tandem for 20 miles in an area near the coast known to be frequented by drug traffickers. Cooke testified that pickup trucks with camper shells were often used to transport large quantities of marihuana. . . . Savage's pickup truck appeared to be heavily loaded, and the windows of the camper were covered with a quilted bed-sheet material rather than curtains. Finally, both vehicles took evasive actions and started speeding as soon as Officer Thrasher began following them in his marked car. See n.1, *supra*. Perhaps none of these facts, standing alone, would give rise to a reasonable suspicion; but taken together as appraised by an experienced law enforcement officer, they provided clear justification to stop the vehicles and pursue a limited investigation.

Id. at 683, n.3.

The totality of the circumstances giving rise to a detention in *Sharpe* are quite similar to the facts of the instant case in which experienced members of a drug task force observed activity consistent with narcotics transactions in an area of high narcotics use, at a particular location where they had previously made narcotics arrests, followed by the flight of all of the participants, including the car parked at the curb, at their mere approach.

As the Court noted in *Sharpe*:

> The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures. The authority and limits of the Amendment apply to investigative stops of vehicles such as occurred here. *United States v. Hensley*, 469 U.S. 221, 226, 105 S.Ct. 675, 679, 83 L.Ed.2d 604 (1985); *United States v.*

Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 694, 66 L.Ed.2d 621 (1981); *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 139, 1401, 59 L.Ed.2d 660 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 880, 95 S.Ct. 2574, 2578, 2579, 45 L.Ed.2d 607 (1975). In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), we adopted a dual inquiry for evaluating the reasonableness of an investigative stop. Under this approach, we examine

> "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*, at 20, 88 S.Ct., at 1879.

As to the first part of this inquiry, the Court of Appeals assumed that the police had an articulable and reasonable suspicion that Sharpe and Savage were engaged in marihuana trafficking, given the setting and all the circumstances when the police attempted to stop the Pontiac and the pickup. 660 F.2d, at 970. That assumption is abundantly supported by the record. [Footnote omitted.]

Id. at 682.

Professor LaFave discusses an empirical study which states that a person who flees at the sight of a police officer will most likely be detained. 3 LaFave, Search and Seizure (2d ed. 1987) § 9.3(c), p. 448, fns. 144 & 145.[4] As stated above, un-

4. All of the parties and the California State Court of Appeal's opinion below take the position that, although the officers were in an unmarked car, they were wearing police jackets and that respondent and the other suspects fled, assuming that they were the police. Professor LaFave (continued...)

provoked flight by a suspect at the approach of others has long been considered as evidencing a guilty mind. *Peters v. New York*, 392 U.S. 40, 68. Whether that detention is justified depends upon the totality of the circumstances. *United States v. Cortez*, 449 U.S. at 417-418; *State v. Jackson*, 434 N.W.2d at 388-389. Where one of the circumstances is the immediate flight of a suspect, unprovoked by any official conduct other than the arrival of officers on the scene, little more is needed by way of articulable facts to justify an investigatory detention. See *State v. Jackson*, 434 N.W.2d 386; *Commonwealth v. Sanchez*, 403 Mass. 640, 531 N.E.2d 1256 (1988) [defendant fled after initially giving permission for a search]; 3 LaFave, Search and Seizure (2d ed. 1987) § 9.3(c), pp. 448-451, notes 143-164, 1990 Pocket Part pp. 44-45 and cases collected therein. The existence of some evidence of criminal activity, however, assures that the officer is acting on reason rather than mere instinct in chasing an individual who runs or otherwise takes flight in the presence of police authority. See *e.g.*, *Hinton v. United States*, 424 F.2d 876 (1969); *State v. Talbot*, 792 P.2d 489 (Utah App. 1990).

In *People v. Shabaz*, 424 Mich. 42, 378 N.W.2d 451, (1985), the Supreme Court for the State of Michigan disallowed an investigatory stop in which plainclothes police officers driving an unmarked vehicle observed defendant Shabaz leaving

4. (...continued)
takes the position that flight by suspects can be taken into account as indicia of wrongdoing only if the suspects are aware that the person or persons approaching are in fact police. 3 LaFave, Search and Seizure (2d ed. 1987) § 9.3(c), p. 448, fn. 143. However, this Court stated in *Peters* that "furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea." *Peters v. New York* decided with *Sibron v. New York*, 392 U.S. 40, 68. While the certainty of a suspect's recognition of the person approaching as a police officer may cause a court in a particular case to give that suspect's flight greater weight, any ambiguity concerning the suspect's knowledge of the identity of an individual from whom he flees should not cause a court to simply disregard the suspect's flight as a factor in deciding whether an investigatory detention was reasonable.

a building in the city of Detroit. Although the officers had not received a report at that time of any felony having been committed in the vicinity of the building by anyone fitting the description of the defendant, one of the officers testified that in his 11 years on the police force he had made 5 or 6 arrests for concealed weapons offenses and approximately 10 drug arrests at that same address. When the defendant left the building he was carrying a small paper bag. As the police vehicle caught up to the defendant, the defendant looked in the officer's direction and immediately began stuffing the paper bag in a vest or in his pants. When the vehicle had almost come to a stop at the defendant's location, the defendant immediately started to run. The officers chased him, and after catching him, went into a vestibule of a building into which the defendant had run, and found a closed brown paper bag containing a handgun. One officer testified that he believed that the defendant was hiding either a weapon or narcotics at the time he stopped the unmarked police car. 378 N.W.2d at 453. The majority opinion of the Michigan Supreme Court listed all of the factors which could give rise to a reasonable suspicion for detention, including the flight of the defendant, and then proceeded to argue away each of the factors individually as equally indicative of innocent behavior to reach the result that an impermissible *Terry* stop had been made. 378 N.W.2d at 459-461. The dissent in that case properly concluded that a consideration of the totality of the circumstances supported an investigatory detention of the defendant:

> [S]ince *Terry*, the Supreme Court has consistently held that the "reasonable suspicion" required for a valid investigative stop must be judged by the totality of the circumstances at the time of the incident. As the majority observes, this totality has been specifically held to include the experience and heightened perceptions of the police officers involved, *United States v. Cortez*, *supra*.

It is true that *flight* alone cannot give rise to probable cause, since, were it otherwise, anyone who does not desire to talk to the police and who either walks or runs away from them would always be subject to legal arrest. LaFave, Search and Seizure, § 3.6, p. 669.

It is also true that concealment itself may be insufficient to justify a stop. *Id.* The majority has not, however, set forth authority justifying the conclusion that, in combination, the observation by experienced police officers of concealment and flight may not provide a reasonable suspicion that criminal activity is occurring. Indeed, the case cited by the majority, *United States v. Green*, 216 U.S.App.D.C. 329, 670 F.2d 1148 (1981), not only does not support the conclusion of the majority that the officers had only a generalized suspicion, it is actually a holding that the officers' observation of activity typical of a narcotics transaction, the concealment of a brown paper bag and the flight and evasion by defendant when approached by an unmarked police car, constituted probable cause for arrest. *Id.* at 332, 670 F.2d 1148.

The majority has discredited the inference which reasonable police officers might draw and has bifurcated the circumstances to conclude that the sum of the circumstances is not "greater than the sum of their parts." (Slip op. p. 11.)

The purported justification for their conclusion is that each circumstance may have been innocent. This analysis obscures the significance of the officers' experience and renders the totality of circumstances test meaningless.

378 N.W.2d at 465.

This Court granted certiorari in the *Shabaz* case, 475 U.S. 1094 (1986), but later dismissed certiorari as moot after the defendant died. 478 U.S. 1017 (1986). As shown by the facts of *Shabaz* and this case, guidance by this Court is necessary concerning the issue of flight in the realm of the totality of the circumstances presented in a given case. If the importance of flight unprovoked by the conduct of the police is given proper weight, and other indicia of criminal activity are present, these factors should suffice to create the necessary conditions for an investigatory detention and would provide a standard for lower courts to follow. Some indicia of suspected criminal activity plus flight provides a basis for detention which is as substantial as a detention based upon the drug courier profile which was recently upheld by this Court in *United States v. Sokolow*, 490 U.S. 1 (1989).

CONCLUSION

Flight from the presence of police officers which is not induced or provoked by conduct on their part, does not by itself provide reasonable cause for the detention of the individual who has fled. However, if in assessing the totality of the circumstances confronting the police officer any indicia of criminality is reasonably found in addition to such flight, then the requirement of a particularized and specific suspicion of criminal activity has been satisfied by the flight of the suspect. Whether equal weight should be given where the police officers are traveling in an unmarked car or are wearing civilian clothes should be the subject of case by case analysis based upon the totality of all the circumstances surrounding the detention.

Respectfully submitted on behalf of the
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